In my opinion therefore for the reasons stated the Legislature has not by the wording of paragraph (b) of section 313 of the Ordinance excluded *mens rea* by necessary implication. I conceive it to be my duty in circumstances such as are present in this matter either to quash or confirm the order of the Magistrate's Court. I think the Magistrate's Court is *functus officio* with regard to it. As the prosecution have failed, on the facts as found by the learned Magistrate, to prove the *actus reus* necessary for a conviction of the accused under paragraph (b) of section 313 of the Ordinance I order that the conviction and sentence be quashed and that the accused be acquitted. Fine to be refunded.

Conviction and sentence quashed. Accused acquitted.

Solicitors: *Presgrave & Matthews.*

ALAGAPPA CHETTIAR v. COLISEUM CAFE (No. 2)

[A. C. J. (Ong J.) August 6, 1962]

[K.L. — F.M. Civil Appeal No. 11 of 1961]

Practice and Procedure — Costs — Appeal or on cross-appeal from decision of lower court — R.S.C., O.65 r.27, regulation (59).

This was an application by the respondent in the Court of Appeal for review of the taxation of his bill of costs by the Assistant Registrar and for the bill to be remitted back for taxation with appropriate directions. The question raised was whether regulation (59) of Order 65, rule 27 of the Rules of the Supreme Court, 1957, which fixes profit costs at 30 per cent. of the value of the subject matter, applies not only to appeals to the High Court from decisions of Subordinate Courts, but also, by extension or analogy, to bills of costs carried in for taxation upon appeals from the High Court to the Court of Appeal in cases where the proceedings originated in the Subordinate Courts. The learned Assistant Registrar was of the opinion that it did and he accordingly taxed the respondents bill of costs under the first proviso to regulation (59) and allowed the profit costs at 30% of 12 months' rent of the premises in question added to the claim for mesne profits.

Held: regulation (59) of R.S.C., O.65 r.27 is limited expressly to taxation in appeals "from a decision of a lower court" and the last proviso, which refers to "the judge hearing the appeal", leaves no further room for doubt, since appeals to the Court of Appeal are not heard by a single judge.

Application allowed with costs to be taxed. Respondent's bill remitted to the Assistant Registrar for taxation according to scale.

Observations on the reasons given by the Assistant Registrar for taking the view he did.

Cases referred to:—

(1) *Sparrow* v. *Hill* (1881) 7 Q.B.D. 362, 367.

(2) *Craske* v. *Wade* (1889) 80 L.T. 380.

(3) *Re Johnson* [1904] 1 Ch. 132.

APPLICATION FOR REVIEW OF TAXATION.

S. D. K. Peddie for the appellant.

R. Ramani for the respondent.

Ong J.: This is an application by the successful respondent in the Court of Appeal for review of the taxation of his bill of costs by the Assistant Registrar and for the bill to be remitted back for taxation with appropriate directions. The question raised is whether regulation (59) of Order 65, rule 27 of the Rules of the Supreme Court, 1957, which fixes profit costs at 30 per cent of the value of the subject matter, applies not only to appeals to the High Court from decisions of subordinate courts, but also, by extension or analogy, to bills of costs carried in for taxation upon appeals from the High Court to the Court of Appeal in cases where the proceedings originated in the subordinate courts. The learned Assistant Registrar was of the opinion that it did and he accordingly taxed the respondents bill of costs under the first proviso to regulation (59) and allowed the profit costs at 30 per cent of twelve months' rent of the premises in question added to the claim for mesne profits. With respect, I am afraid that I am unable to agree.

Regulation (59) reads as follows:

" (59). Where costs are awarded by the Supreme Court in an appeal or on a cross-appeal from a decision of a lower Court, the profit costs shall ordinarily be a sum equal to thirty per centum of the value of the subject matter of the appeal or cross-appeal.

Provided that in any appeal relating to the recovery of immovable property the value of the subject matter of the appeal shall be deemed to be twelve months' rent of the premises or the annual value added to the amount of any money claim for rent or mesne profits or damages.

Provided further that in any appeal relating to maintenance orders in respect of married women and children the subject matter shall be deemed to be an amount equivalent to twelve times the amount of the monthly order for maintenance or where no order has been made, such amount as the Court may assess, subject in all cases to a maximum of $1,000 in the case of Magistrates' Courts and $2,000 in the case of Sessions Courts.

Provided however that in cases of special importance or difficulty the Judge hearing the appeal shall have power if so requested when awarding such costs to direct that the same be taxed in accordance with the Scale of Costs applicable to proceedings in the Supreme Court and to give any such directions concerning the maximum amount to be allowed on such taxation as in the circumstances may be just."

In my opinion this regulation is limited expressly to taxation in appeals "from a decision of a lower court", and the last proviso, which refers to "the Judge hearing the appeal", leaves no further room for doubt, since appeals to the Court of Appeal are not heard by a single Judge.

I think I ought to make some observations on the reasons given by the Assistant Registrar for taking the view he did, since he had obviously taken great pains over the matter. First, it is true that there is the reference to "the Supreme Court" in the Regulation, but in the context, it can only mean the High Court as part of the Supreme Court. Appeals from the lower courts can never go direct to the Court of Appeal. An appeal to the High Court and a second appeal to the Court of Appeal are two distinct appeals,

and not one in fact merely because "it is the decision of the Subordinate Court which remains substantially in issue".

Secondly, because the scale of costs and allowances is the same for proceedings in the High Court and in the Court of Appeal, I do not think it follows that all distinctions are broken down between an appeal to the High Court from a decision of a lower court and that from the High Court to the Court of Appeal.

Thirdly, "Judge" in the last proviso cannot possibly be read to include the plural because the Judges of the Court of Appeal only hear and determine appeals from judgments or orders of the High Court in civil matters made in the exercise of its original or of its appellate jurisdiction (vide section 36 of the Courts Ordinance, 1948).

Lastly, it is said that even if regulation (59) is held not to be applicable to proceedings in the Court of Appeal, the taxing officer can nevertheless fall back on regulation (38A) to support a taxation made in accordance with regulation (59) because "he could not do better than to tax the profit costs at 30% of the value of the subject matter on the analogy of regulation (59)". Regulation (38A) is as follows :

" (38A). If upon any taxation it shall appear that the costs have been increased by unnecessary delay or by improper, vexatious, prolix or unnecessary proceedings, or by other misconduct or negligence, or that from any other cause the amount of the costs is excessive having regard to the nature of the business transacted or the interests involved or the money or value of property to which the costs relate, or to the circumstances of the case, the Registrar shall allow only such an amount of costs as may be reasonable and proper, and may assess the same at a gross sum, and shall (if necessary) apportion the amount among the parties if more than one. The provisions as to the review of taxations shall apply to allowances and certificates under this Rule."

This particular regulation, however, cannot be prayed in aid in the present instance. There is no evidence nor any suggestion that the costs have been increased by any improper proceedings, or by other misconduct or negligence, or that *from any other cause* the amount of the costs is excessive *having regard to the money or value of property to which the costs relate*, so as to call for the Assistant Registrar to exercise his discretion under this regulation by assessing a gross sum as a reasonable allowance. In my opinion there was no exercise of discretion, and even if there was, it clearly was made, for the reasons given, on erroneous principles.

At the commencement of the hearing of this application in chambers I had expressed my opinion as stated above. Mr. Peddie, however, raised a preliminary objection to my review of the taxation on the ground that certain conditions precedent had not been fulfilled. I accordingly adjourned this matter into open court for argument. Mr. Peddie's contention is that before any application can be made to a judge for review of taxation under regulation (41), an objection must first be carried in before the Assistant Registrar under regulation (39) to be dealt with in accordance with regulation (40), which was not done in this case. He cited in support *Sparrow* v. *Hill*[1] and *Craske* v. *Wade*,[2] and submitted that in point of fact the Assistant Registrar did "tax" and tax properly under regulation (59). I asked Mr. Peddie, "what if taxing under regulation (59) was wrong in principle?" and his answer was that, even if the Assistant Registrar had erred in principle, nevertheless he had taxed in accordance with the principle which he thought to be right, and an objection must still be carried in, on the authority of *Craske* v. *Wade*. I do not think, however, that this case is any authority for the proposition which he submitted; rather the contrary. There the Master had taxed and disallowed certain items and an application was made to review his decision in having disallowed those items without having carried in objections at all. It was contended that sub-rules 39 and 41 of rule 27 of Order 65 had no application where the Master's decision in respect of the particular items disallowed was based upon some general principle. This contention was rejected by the Court of Appeal and the reason given by Williams L.J. was as follows :

" There is no such proposition, and it was impossible that any authority to that effect should be produced, because, if there was any such authority, the result would be that if you can only review the master's decision where he was wrong in principle and you can say that you can review without carrying in objections, it necessarily follows that you need never carry in objections at all. That is not so . . . but . . . I quite agree that if you can really draw the inference that the taxing master had refused to tax, or had refused to tax in accordance with the terms of the order in this case, rules 39 and 41 would have no application . . . . If the master refused or neglected to give effect to any provision of the order under which he was taxing, I daresay it may be, and probably is so, that you may review the taxation without carrying in objections thereto."

The rule of practice on this very point is thus stated in *Daniell's Chancery Practice* (8th Ed.) at page 1104 :

" If the taxing master has omitted to tax the costs which have been directed to be taxed, or if it is conceived that in taxing them he has adopted some general principle which cannot be supported, the dissatisfied party has a right to bring the point before the Court, or Judge at Chambers, without carrying in objections."

Among the authorities referred to in that passage of Daniell's is *Re Johnson*.[3] The whole of the judgment of Farwell J. is so apposite to the instant case that it should be quoted *in extenso*, but the headnote will suffice for present purposes :

" The discretion given to taxing officers by sub-rule 38a of rule 27 of Order LXV, to assess a lump sum for the costs in lieu of taxation, is a very delicate one, to be exercised judicially and only when special circumstances justify that course, and then only on evidence. And if a taxing officer proceeds under the sub-rule, it is his duty to state in his certificate that he has assessed under the sub-rule, and to give his reasons for doing so.

A taxing officer stated in his certificate that he had taxed a bill of costs at a certain figure, but he had in fact proceeded under the sub-rule and had assessed a lump sum for costs in lieu of taxation. On summons to review without carrying in objections:—

Held, that the taxing officer had proceeded on a wrong principle, and that the bill of costs must go back for taxation."

I accordingly overrule the objection raised by Mr. Peddie and allow this application with costs to be taxed. The respondent's bill is remitted to the Assistant Registrar for taxation according to scale.

Objection overruled.

Solicitors: *Bannon & Bailey; Braddell & Ramani.*

Re LOH BOON NGHEE, DECD.

[O. C. J. (Hepworth J.) August 17, 1962]

[Penang — Summons-in-Chambers No. 133 of 1962 in Civil Suit No. 158 of 1952]

Executors and Administrators — Commission of — Probate and Administration Ordinance, 1959, s.43 — Principles that should guide a judge in his efforts to fix a fair remuneration.

The plaintiffs were the widow and son respectively of the deceased while the defendant was another son of the deceased. The deceased by his will appointed the defendant executor and trustee of his estate. Under the terms of the will the deceased bequeathed all his properties to the defendant upon trust to divide same and the accumulated income into ten equal shares of which the first plaintiff (widow) was to have two shares and the second plaintiff and the defendant four shares each. The date of distribution was June 5, 1952. On September 18, 1952 the plaintiffs issued a writ for administration of the real and personal properties of the deceased with all necessary enquiries and accounts in connection therewith upon the footing of wilful default. By an order of court of June 29, 1953 the statement of claim was amended and allegations were made that the defendant committed breaches of trust. On January 7, 1954 a deed of settlement was entered into between the plaintiffs and the defendant. By one of the terms of the settlement the plaintiffs withdrew the allegations of breaches of trust and it was specifically provided that the defendant should be at liberty to apply to the High Court for commission for acting as an executor under the said will. Accordingly the defendant applied to the court by way of Summons in Chambers which was adjourned into open court, for an order that his remuneration as an executor and trustee be fixed and paid out of the estate of the above-named deceased.

Held: (1) taking all the circumstances of the case and the fact that the defendant managed his own properties which were in the general area of those of the estate of the deceased and that there were persons employed to look after the estate properties the defendant will be adequately recompensed if a commission at 3% is allowed;

(2) it was not open to the plaintiffs to allege fresh breaches of trust which were not pleaded as they had specifically withdrawn allegations of breaches of trust in accordance with the terms of the deed of settlement.

The principles which should guide a judge in fixing remuneration for an executor or administrator under section 43 of the Probate and Administration Ordinance, 1959 considered. *Tan Soo Lock* v. *Tan Jiak Choo* (1) followed.

Case referred to:—

(1) *Tan Soo Lock* v. *Tan Jiak Choo* [1932] S.S.L.R. 6.

SUMMONS-IN-CHAMBERS.

O. L. Phipps for the plaintiffs.

Ong Huck Lim for the defendant.

Cur. Adv. Vult.

Hepworth J.: This is a Summons-in-Chambers which has been adjourned into open Court for argument on behalf of the defendant, the sole executor and trustee of the will of Loh Boon Nghee, deceased, for an Order that his remuneration as such executor and trustee may be fixed and paid out of the estate of the said deceased and that the costs of this application be taxed between solicitor and client and paid out of the said estate.

For the better understanding of this matter it is necessary to trace briefly the history of these proceedings.

The 1st plaintiff is the widow and the 2nd plaintiff is one of the sons of the said Loh Boon Nghee, deceased. The defendant is also a son of the said deceased. The said Loh Boon Nghee, deceased, died on the 6th June, 1945, having by his will dated the 23rd February, 1945, appointed the defendant the executor and trustee thereof. Probate of the said will was duly granted to the defendant on the 28th October, 1946.

Under the terms of the said will the said Loh Boon Nghee, deceased, bequeathed all his residuary estate to the defendant upon trust to divide the same and the accumulated income by way of compound interest thereof into ten equal shares of which the 1st plaintiff was entitled to two shares and the 2nd plaintiff and the defendant to four shares each. Distribution was to be made seven years after the death of the deceased, that is to say the 5th June, 1952.

On the 18th September, 1962, the plaintiffs issued a writ (Penang High Court Civil No. 158 of 1952) alleging that they had made frequent application to the defendant for division of the property and payment of the shares due to them and also for accounts in connection with the administration of the said estate but he had wilfully neglected and/or refused to comply with the plaintiffs' request. The plaintiffs therefore claimed administration of the real and personal estate of the said Loh Boon Nghee, deceased, with all the necessary enquiries and accounts upon the footing of wilful default. The defendant's defence was a denial that he had wilfully neglected and/or refused to comply with the request and that the distribution of the estate was proceeding.

By an order of court dated the 29th June, 1953, the statement of claim was amended and allegations were made that the defendant had committed breaches of trust, firstly, in that he had kept a personal account with the estate of the said deceased and had wrongly credited such account with certain sums of money, and secondly, in that he had failed to invest, as directed by the will, certain sums of cash in hand and at the bank.

On the 7th January, 1954, a Deed of Settlement was entered into between the plaintiffs and the defendant setting out terms upon which Penang High Court Civil Suit No. 158 of 1952